

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**JOHN DOE, et al.,**

**Plaintiffs,**

**v.**

**Case No. 2:08-cv-575  
JUDGE GREGORY L. FROST  
Magistrate Judge Norah McCann King**

**MOUNT VERNON CITY SCHOOL  
DISTRICT BOARD OF EDUCATION, et al.,**

**Defendants.**

**OPINION AND ORDER**

This matter is before the Court on Defendant John Freshwater's Motion for Continuance of Trial Date (Doc. # 92), Plaintiffs' Response in Opposition to Defendant's Motion for Continuance and Motion for Sanctions for Defendant's Failure to Comply with this Court's Discovery Orders (Doc. # 96), and Freshwater's Reply in Support of his Motion for Continuance and Memorandum in Opposition to Plaintiffs' Motion for Sanctions (Doc. # 97). For the reasons that follow, the Court **GRANTS** Freshwater's Motion for Continuance and **HOLDS IN ABEYANCE** Plaintiffs' Motion for Sanctions.

**I. Freshwater's Motion for Continuance**

This case was filed on June 13, 2008 and a jury trial is scheduled for May 24, 2010. On April 28, 2010, this Court granted the motion to withdraw as counsel two of Freshwater's trial counsel, Robert Stoffers and Jason Deschler. (Doc. # 90.) Attorneys Stoffers and Deschler were retained by Freshwater's employer's insurance company, Ohio Casualty Insurance Company. In their motion to withdraw, Stoffers and Deschler indicated that Freshwater was still represented in

this action by Attorney R. Kelly Hamilton. (Doc. # 88.)

On May 3, 2010, Freshwater filed his motion to continue the trial date claiming that he is without trial counsel. Freshwater contends that Attorney Hamilton has never represented him against the claims filed against him by Plaintiffs. Instead, Freshwater contends that Hamilton was only involved in this action in relation to the counterclaims Freshwater filed against Plaintiff, on which this Court granted summary judgment to Plaintiffs. (Doc. # 80.) Hamilton claims that since the Court dismissed the counterclaims he has no longer represented Freshwater in any capacity in this action. Freshwater asserts that Ohio Casualty Insurance Company will retain new counsel for his defense in this action but that the insurance company's claim analyst has requested that Hamilton approach the Court for a continuance, writing in an email to Freshwater:

Mr. Hamilton is your attorney for purposes of defending the lawsuit against you, as was the firm of Mazanec Raskin, Ryder & Keller. If it is your intent to have me appoint replacement co-counsel for you, I can only do so if the court is willing to move the trial date. Would Mr. Hamilton be willing to approach the court with a motion to secure a continuation of trial in order to allow for replacement co-counsel to be located and appointed?

(Doc. # 92-1.)

In their opposition memorandum, Plaintiffs argue that it would be unfair to continue the trial date when they have diligently prepared for trial and have patiently awaited their day in Court. Plaintiffs are especially concerned about the unfairness to ZD, who "will likely have to sit through at least a part of another school year with this matter hanging over his head" if a continuance is granted. Further, Plaintiffs argue that Attorney Hamilton has been an "active participant in various aspects of this case," including participation in discovery, participation in conferences before this Court, in person and on the telephone, *after* the dismissal of Freshwater's

counterclaims. (Doc. # 96 at 3, 4.)

This Court agrees with Plaintiffs' assessment of Attorney Hamilton's involvement in Freshwater's defense. Despite Hamilton's insistence that he was not involved in Freshwater's defense, his actions spoke otherwise. After this Court's dismissal of Freshwater's counterclaims Hamilton on several occasions held himself out as trial counsel for Freshwater and this Court accepted him as such. Indeed, after the final pretrial conference during the approximately five hours of settlement negotiations held with this Court's assistance, Hamilton participated most aggressively on behalf of Freshwater. The Court is sorely disappointed at the current unbelievable assertions of uninvolved made by Hamilton.

That being said, the Court has had an uncommon schedule opening that will permit it to reschedule the trial in this action for July 26, 2010. While the Court is sympathetic to Plaintiffs' position, with the trial held in July it will alleviate one of their more pressing concerns, *i.e.*, that ZD would be required to attend another year of school with this matter unresolved. Accordingly, the Court **GRANTS** Freshwater's Motion for Continuance of Trial Date and **RESCHEDULES** a jury trial in this matter to commence at 9 a.m. on July 26, 2010.

## **II. Plaintiffs' Motion for Sanctions**

Plaintiffs combined a motion for sanctions with their memorandum in opposition to Freshwater's motion to continue. Freshwater combined his memorandum in opposition to the motion for sanctions with his reply memorandum in support of his motion to continue. Plaintiffs, therefore, have not yet had the opportunity to reply in support of their motion for sanctions. Consequently, the Court **HOLDS IN ABEYANCE** its ruling pending the filing of a reply memorandum by Plaintiffs. Plaintiffs are given until May 14, 2010 to file their reply

memorandum.

### **III. Conclusion**

Based on the foregoing, the Court **GRANTS** Freshwater's Motion for Continuance of Trial Date (Doc. # 92) and **RESCHEDULES** a jury trial in this matter to commence at 9 a.m. on July 26, 2010. No further continuances will be granted. Further, the Court **HOLDS IN ABEYANCE** its ruling on Plaintiffs' Motion for Sanctions (Doc. # 96) pending the filing of Plaintiffs' reply memorandum, which is due by May 14, 2010. A non-oral hearing on Plaintiffs' Motion for Sanctions is scheduled for May 17, 2010.

**IT IS SO ORDERED.**

s/ Gregory L. Frost  
**GREGORY L. FROST**  
**UNITED STATES DISTRICT JUDGE**